Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1316

THE RENEGOTIATION BOARD,

Petitioner,

v.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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ARGUMENT

The petition for a writ of certiorari filed in this case provides no compelling reason for the granting of the writ. There is no conflict among the decisions of the courts of appeals; there is no conflict with an applicable decision of this Court; there is no important question of federal law which has not been, but should be, settled by this Court; and, furthermore, this is a case of

limited applicability. Respondent wishes to make three points in opposition to the petition for certiorari:

1. Being principally fact oriented, this case is not the type normally reviewed by this Court. As recognized by petitioner, "Both courts below concluded that the documents at issue here must be disclosed as final agency opinions" (Pet. at 7).

As a result of the first appeal of this case, *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), the matter was remanded to the district court to allow Grumman access to the orders and opinions of the Board. However, because the Board's regulations at the time this case was instituted did not specifically designate any particular document as a "final opinion," Grumman had the burden of identifying which documents in the Board's files constituted such final opinions for purposes of the Freedom of Information Act.[1]

Utilizing a procedure[2] sanctioned by this Court in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), respondent, through the oral testimony of the Board's former Chairman, demonstrated to the satisfaction of the courts below that the documents now at issue are, in fact, final opinions. In the words of the district court:

> As an aid to the resolution of the issue of what constitutes a final order or opinion the Court granted Grumman permission to depose Mr. Lawrence E. Hartwig, Chairman of The Renegotiation Board, as to the procedures followed by

[1] 5 U.S.C. §552(a)(2)(A).

[2] *See* footnote 6, *infra*.

> the Board and the type of documentation which pertains to typical renegotiation cases.

(Pet. at 28A.) After carefully analyzing that deposition, the district court determined which documents in the Board's files constituted "final opinions" by applying the test that "a final opinion is that document which states conclusions and reasons upon which the Board has acted as well as any dissents and concurrences thereto. . . . The essential factor is whether or not it represents the final conclusion and reasoning on which the final determination of the Board is based." (Pet. at 40-41A.) The court of appeals concurred, stating:

> Given the evident care of the District Court's delineation of the facts and its discussion of the issues, we avoid covering the same ground. We hold its findings of fact not clearly erroneous and concur in its conclusions and its judgment.

(Pet. at 3A.) This Court would be required to make this same "delineation of the facts" if, upon granting the writ, it had to determine whether the documents at issue are the Board's final opinions. This function is more economically fulfilled by the lower courts and in this case was properly performed in accordance with the guidelines already set out by this Court. *Environmental Protection Agency v. Mink*, *supra* at 93.

2. The Board was recently described by this Court as having "unique operational methods." *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 42 U.S.L.W. 4203, 4208 (U.S. Feb. 19, 1974). Consequently, a decision determining the applicability of certain sections of the Freedom of Information Act to the extraordinary procedures[3] of this particular agency would necessarily be of limited precedential value.

[3] Unlike other administrative agencies, the Board is not subject to the Administrative Procedure Act, except the public information section thereof. 50 U.S.C. App. §1221.

Moreover, the importance of this case has been even further diminished by a recent change in the Board's regulations. The thrust of the petition for certiorari is that the courts below were incorrect in characterizing certain Board documents as "final opinions" which must be made available to the public pursuant to the Freedom of Information Act. Yet, the Board itself has abated this issue by amending its regulations to require the issuance and publication of "final opinions" in future Board cases.

In its petition to this Court the Board argued that one adverse result of the decisions below will be:

> to force the Board to prepare a full statement of reasons for public release in order to avoid misleading the public as to the basis for its decision.

(Pet. at 13.) However, even before filing its petition, the Board had already issued proposed amendments to its regulations which would require the Board to issue a "final opinion" in every case. 39 Fed. Reg. 2276-2278 (1974). In the preamble to the proposed amendments, Mr. William S. Whitehead, the Board's present Chairman, pointed out that the amendments will "create three new types of opinions which will conform functionally to the other aspects of existing procedures and to the current requirements of the Freedom of Information Act." 39 Fed. Reg. 2276 (1974).

In the preamble to the final regulations which were published on April 16, 1974, 39 Fed. Reg. 13649 (1974), Chairman Whitehead explained the effect of the amendments, as follows:

> The new regulations provide for the issuance of three new types of documents. A Final Opinion, stating the basis for a final determination of excessive profits, if any, and a Regional Board Opinion, stating the basis for a final recommendation of excessive profits, if any, will be furnished to the contractor at the time the Board or the Regional Board, as the case may be, takes its final action in a renegotiation proceeding. Final Opinions and Regional Board Opinions, as well as concurrences and dissents thereto, will be made available for public inspection and copying in the Board's public information library.

This case was instituted at a time when the Board did not publish "final opinions" in accordance with the requirements of the Freedom of Information Act. Since the Board has now designated certain documents as "final opinions" and has provided for their availability to the public (39 Fed. Reg. 13650, §1480.5), little would be gained by having this Court review the decision below.

3. Petitioner also takes issue (Pet. at 9-11) with an alternative holding of the court of appeals that, in addition to their status as final opinions, Regional Board reports are "identifiable records" which must be made available to the public under 5 U.S.C. §552(a)(3) since their disclosure is not prohibited by exemption 5 of the Act.[4]

There is nothing about this issue that justifies review by this Court. The Board does not suggest that this or any other aspect of the decision below is in conflict with any other court of appeals decision. In *Environmental Protection Agency v. Mink*, *supra*, this Court recognized that in applying exemption 5 "Drawing . . . a line between what may be withheld and what must be disclosed is not without difficulties." 410 U.S. at 86.

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[4] 5 U.S.C. §552(b)(5).

Consequently, because the factual permutations that are likely to arise under exemption 5 are infinite, litigation over the applicability of this exemption will continue in the future as it has in the past.[5]

This Court has, however, in *Environmental Protection Agency v. Mink, supra*, already set out its understanding of the framework of that section and has suggested a procedure for the lower courts to utilize when they must determine the applicability of that exemption to a particular fact situation.[6] That procedure having been followed in this case, the court of appeals was in a position to render a well-reasoned opinion as to the applicability of exemption 5 to the facts of this case.

No conflict has arisen among the courts of appeals concerning the meaning of exemption 5, and the Board has not argued otherwise. Consequently, there is no compelling reason for this Court, at this time, to offer any further guidance to the meaning of that exemption beyond that which it provided in *Environmental Protection Agency v. Mink, supra.*

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[5] *See, e.g., Montrose Chemical Corp. of Cal. v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Bristol-Myers Co. v. FTC*, 424 F.2d 935 (D.C. Cir. 1970); *General Services Admin. v. Benson*, 415 F.2d 878 (9th Cir. 1969).

[6] "An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency." 410 U.S. at 93.

CONCLUSION

Since the petition does not raise any of the issues set forth in Supreme Court Rule 19 as grounds for review, it is respectfully suggested that the writ of certiorari be denied.

Respectfully submitted,

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